

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Orig. w/ affidavit of mailing

75-1034

To be argued by
PAUL B. BERGMAN

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Rys*

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1034

UNITED STATES OF AMERICA,

Appellee,

—against—

MARIO LOBO,

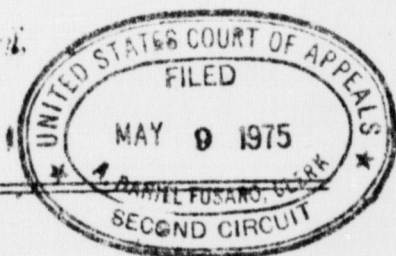
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Eastern District of New York.*

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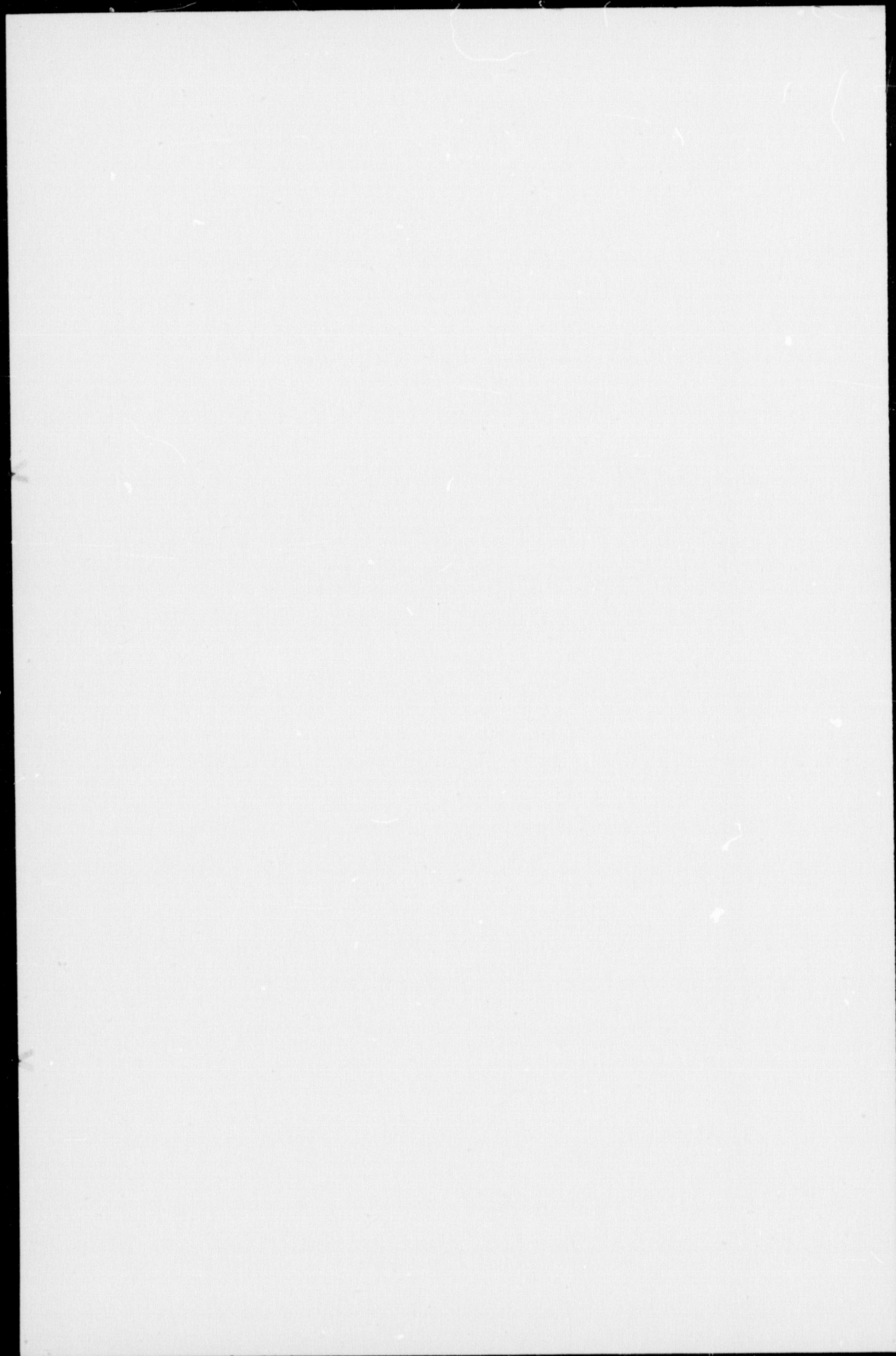


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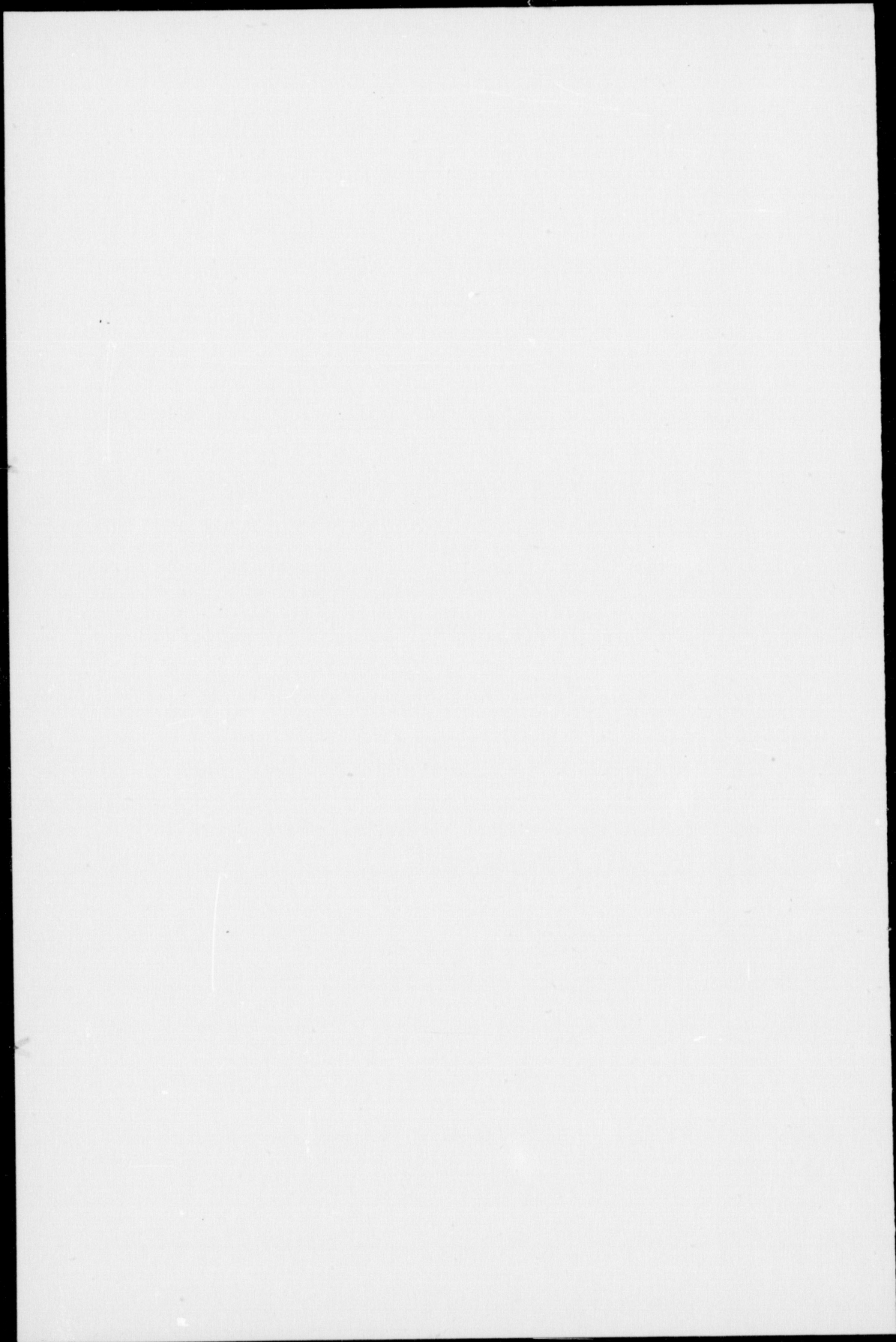
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1034

UNITED STATES OF AMERICA,

Appellee,

—against—

MARIO LOBO,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Mario Lobo appeals from a judgment of conviction of the United States District Court for the Eastern District of New York (Mishler, *Ch. J.*) entered January 17, 1975. The judgment followed a jury verdict of guilty pursuant to an indictment charging him with violating Title 21 U.S.C. §§ 173 and 174 (conspiracy to receive, conceal, buy, sell and facilitate the transportation of heroin, a narcotic drug). Appellant was sentenced to 15 years imprisonment and a \$20,000 fine. He is presently incarcerated.

The indictment, returned May 8, 1974 * also charged Aurelio Martinez-Martinez, Gerard Nobile, Giovanni Pari-

* This indictment (74 Cr. 364) superseded an initial indictment (73 Cr. 221) returned March 1, 1973. The allegations in both indictments were virtually the same except that additional overt acts in furtherance of the conspiracy were alleged in the later indictment.

sio, Jose Guillermo Gauthier Geronimo and one John Doe with participation in the conspiracy. However, Aurelio Martinez-Martinez was the only one of appellant Mario Lobo's co-conspirators who was apprehended by federal authorities.

Mr. Martinez-Martinez stood trial along with appellant Lobo and was also convicted pursuant to a jury verdict. However, much of the trial took place in his absence because he failed to appear in court on the morning of November 8th, four days after the trial began. A motion by counsel for Martinez-Martinez for a mistrial was denied. After the Court had conducted the appropriate investigation and determined that Martinez-Martinez was voluntarily absent, the trial continued. Before resting its case against Martinez-Martinez, the Government presented evidence of his flight on the issue of consciousness of guilt. The jury was instructed by the Court that this evidence was not to be used in any way against appellant Mario Lobo in determining his guilt or innocence.

On this appeal appellant claims reversible error arose because, it is argued, the trial court violated the mandate of *Bruton v. United States*,* "by relying on limiting instructions to the jury to prevent the reinforced impact of the co-defendant's guilty flight during trial from transferring" (Brief, 1) to appellant. Appellant does not challenge the sufficiency of the evidence.

* 391 U.S. 123 (1968).

Statement of the Case

A. The testimony

On June 14, 1969, Gerard Nobile, a young Frenchman, entered the United States at the Port of New York on board the vessel "Raffaello" from France. With him he brought a white Peugeot automobile in which thirty kilos of French heroin were carefully concealed. The automobile successfully cleared through United States Customs without discovery of its illicit contents and was returned to the custody of Nobile (114; see also Government Exhibit 13).*

In early July, André Ricord,** an international narcotics smuggler living in Asunción, Paraguay, under cover of legitimate business operations, directed one of his associates, Pierre Gahou, to fly to New York to aid in the distribution and sale of the "merchandise" concealed in the Peugeot (94). Prior to Gahou's departure he was introduced by Ricord to a man called "Mitto" (95; whose real name was Gauthier) and they made arrangements to contact each other in New York (97-99). Thereafter, Gauthier traveled to New York alone.

* Page numbers in parenthesis refer to pages in the trial transcript.

** Auguste Joseph Ricord, a/k/a Andre Ricord was indicted in March, 1971 for violation of 21 U.S.C. §§ 173, 174 (conspiracy to import narcotics) while he was living in Paraguay. He was extradited to the United States on September 2, 1972 after 17 months of litigation. A superseding indictment was filed on October 2, 1972 and Ricord's trial commenced on December 5, 1972 in the Southern District of New York (72 Cr. 1105). On December 15, 1972 a jury found Ricord guilty as charged and he was subsequently sentenced to the maximum term of 20 years imprisonment and the maximum fine of \$20,000. (The judgment of conviction was affirmed by this Court (478 F.2d 1397), and the United States Supreme Court denied certiorari (414 U.S. 109)).

On July 22, 1969, immediately before Gahou's embarkation by plane for the United States, Ricord gave him a photograph of a man named "Jean Claude" (whose real name was Gerard Nobile) and a telephone number where he could be reached. Gahou was instructed to contact Jean Claude upon his arrival in New York City (103).

Gahou arrived in New York via Miami, Florida on July 24, 1969. He checked in at the Hotel Taft (see Government Exhibit 10) and immediately tried to reach Nobile by phone (106). Problems ensued due to the fact that Gahou spoke no English and two calls that day failed to elicit Nobile's whereabouts (107, 108). Meanwhile Gahou met Gauthier in the Hotel McAlpin bar pursuant to their arrangements and gave him a progress report (107).

The following day, Gahou finally succeeded in reaching Nobile and the two met over drinks in the bar at the Hotel Taft (108-111). Nobile told Gahou that he had arrived 20 days earlier by ship and had been waiting to be contacted (114). Meanwhile, he had run out of funds as expenses had been higher than anticipated. He had slept in the Peugeot and sold some of his clothing to obtain enough money to get along. Finally, he met a French teacher in Greenwich Village who agreed to put him up (114-115). Meanwhile, the Peugeot had been parked on the street and wouldn't start as he didn't have money to buy gas. They discussed the possibility of safely removing the heroin from the car at its present location and concluded that this was impossible. Gahou then told Nobile he would try to arrange for a garage and would get back to him (116).

On July 26th, Gahou met Gauthier again at the McAlpin Hotel bar. They discussed their difficulties with the car and Gauthier gave Gahou \$200 to be used to get the Peugeot in running order (117, 137). Later that day, Gahou passed the money to Nobile along with Gauthier's instructions (137). Then he met Gauthier again.

While walking along midtown streets, they met two men who Gauthier introduced as his friends, "Mario" and "El Nino" (subsequently determined to be the appellant Mario Lobo and his co-defendant Aurelio Martinez-Martinez respectively) (139). While Gahou stood on the sidewalk just out of earshot the other three engaged in conversation (141). Gauthier subsequently informed him that these friends would locate a garage for the Peugeot (142). Later that day, Nobile advised Gahou that the car was now running and had been re-parked in a safe location (143).

On July 27th, Gauthier informed Gahou that garage space had been obtained and they agreed to meet at the corner of 57th Street and 7th Avenue the next morning to drive to the chosen location (144).

When Nobile and Gahou pulled up at the agreed upon corner in the Peugeot the next day, they found Gauthier already standing on the sidewalk. He instructed them to follow a brown Ford LTD parked just ahead. Gauthier then got into the first car and they all proceeded across Manhattan and across the bridge to New Jersey (148-149). Eventually they pulled up to a small garage located next to a private house and parked the Peugeot inside (150-151). Meanwhile Gauthier, appellant Mario Lobo and Martinez-Martinez got out of the LTD (150).

Nobile, Martinez-Martinez and Gahou then began the laborious process of dismantling and searching the Peugeot for the heroin because none of them knew precisely where the contraband was hidden (154-162). Also present in the garage was a middle-aged man wearing a revolver who neither spoke nor assisted with the operation in any way and who was not known by Gahou. (He was subsequently named as John Doe in the indictment) (151-152, 163). The search revealed a number of half-kilo clear plastic pack-

ages in the rocker panels of the auto (154), behind its headlights (162) and under the flooring of the trunk (159-162). Those located in the rocker panels were attached to strings and had to be carefully pulled through small holes drilled in the panels (154-158). Each package measured approximately 6" x 9" (156) and a total of 60 such packages were recovered (162).

While the car was being dismantled, Martinez-Martinez asked Gahou if Ricord would sell him some heroin and gave Gahou an address in Union City, New Jersey where he could always be located (167).

When the car had been re-assembled, Gahou returned to New York alone by taxi (165). Later that day he again met with Gauthier, who told him to return immediately to Paraguay (166).

Just prior to Gahou's departure for Paraguay the next day, Gauthier met with him one final time. He handed Gahou \$20,000 in cash for delivery to Ricord and told him to tell Ricord not to worry as the "merchandise" would be sold and he would receive the balance of the money due him (169).

Upon his return to Asunción, Gahou related to Ricord everything that had occurred in New York. Ricord expressed great displeasure with the fact that he had not returned with total payment for the shipment. Gahou also conveyed Aurelio Martinez-Martinez' request to work out a deal so he could purchase heroin from Ricord (170-171).

On August 5, 1969, Gahou again arrived in New York City pursuant to orders from Ricord, who was still seeking payment for the previously delivered heroin (172). This time Gauthier and his wife flew to New York on the same plane but upon arrival, Gahou checked in at the Hotel Taft alone (173). The next day, Gauthier picked him up at

the Taft and they took a taxi to a laundromat somewhere on Broadway. Gauthier went in and came out with appellant Mario Lobo. Standing several steps away on the sidewalk Gahou saw the same silent man with the revolver who had been in the garage in New Jersey. Gauthier told Gahou to wait for him in a nearby bar. A few minutes later Gauthier returned and informed Gahou that "the situation was very hot" and that he should return to Asunción immediately. He told Gahou to inform Ricord that it was just a question of letting a "difficult moment go by" and that there was nothing to worry about. Gauthier's wife had agreed to remain in New York until all the money was ready for delivery to Ricord (173-175).

During the next few days Gahou completed some purchases relating to the construction of Ricord's new hotel and then flew back to Paraguay (175). Upon his return he informed Ricord of everything that had transpired, including the fact that things were too "hot" in New York to complete safely the sale of all the heroin (175-176, 179).

On September 2, 1969, Gahou once again returned to New York as Ricord still had not been paid. The next day he took a cab to the Union City, New Jersey address supplied by Martinez-Martinez. The address turned out to be that of a record shop and a woman who claimed to be Martinez-Martinez' wife sent a young boy to find him. A few minutes later Martinez-Martinez came in and the two went to a nearby bar to **talk things over**. Gahou explained that Ricord was anxious to be paid and Martinez-Martinez told him it still wasn't ready. He explained to Gahou that it was useless to keep making expensive trips up from South America as they would be notified when all the "merchandise" had been sold. Gahou told Martinez-Martinez that Ricord was willing to deal with him providing they could agree on a price. Martinez-Martinez offered to pay \$11,000 per kilo. Before they parted company, Mar-

tinez-Martinez handed Gahou \$500 as a gift to help defray his expenses (110-183).

A few days later Gahou returned to Paraguay to face an angry and upset Ricord. He kept saying, "if those people go to jail then everything is going to be completely lost." Ricord had no visible reaction to Martinez-Martinez' offer of \$11,000 per kilo for a shipment of heroin (184).

On November 5th, Gahou traveled to the United States a fourth time. This time he went only as far as Miami and checked into the Hotel Dupont Plaza (185). About a week after his arrival, Gauthier came to the hotel bringing along a black, leather-like attache case which he said contained the \$200,000 owing to Ricord. He asked Gahou to keep the case overnight as he felt it was unsafe to keep it where he was staying. Gahou took the suitcase to his room and opened it to reveal bundles of \$50 and \$100 bills. He then placed the case in his bureau for safekeeping (188a-189).

The following morning, Gauthier returned and Gahou retrieved the case from his room. Gauthier took it and drove away (189-190). Gahou remained in Miami about a month and then returned to Paraguay. At that time Ricord acknowledged safe receipt of the money and promised Gahou \$20,000 for his services. When Gahou was arrested in New York on October 28, 1970, for his involvement in another narcotics transaction, he still had not been paid (190-191).

At least half of the 30 kilo shipment of heroin was sold to long-time narcotics dealer Alfredo Aviles by appellant Mario Lobo and Aurelio Martinez-Martinez (431-432, 440-441). Aviles cut the heroin and resold it in much smaller quantities, usually of one ounce each (430).

At some point during the summer of 1969, Aviles ran into Martinez-Martinez in a Manhattan bar. They had been acquaintances since 1964. In the course of their con-

versation, Aviles told Martinez-Martinez he was looking for a supply of heroin and Martinez-Martinez said he could get him some. The next day he came over to Aviles' house at 212 Forsythe Street. Aviles agreed to pay \$18,000 per kilo for heroin which could be cut four times. Aviles gave him a \$10,000 down payment on the first kilo. Two days later, Martinez-Martinez returned to Forsythe Street bringing a brown paper sack which contained heroin placed into two clear plastic bags of a half-kilo each (425-429).

Aviles testified that he bought heroin from Martinez-Martinez on approximately 15 occasions between the summer of 1969 and December of the same year. A week or a week and a half would usually elapse between each transaction (431-432). After the first five or six sales had taken place, Mario Lobo (who Aviles had first met in 1967) started coming over to Aviles' house with Martinez-Martinez whenever transfers of heroin and/or money were going on (432-433, 439). Each time that Aviles purchased from the two men, the amount was one kilo and the price \$18,000. The narcotics were always packed in two clear plastic bags of one-half kilo each (440).

Then, in December 1969, Martinez-Martinez told Aviles that if he wanted more drugs he would have to go to Miami for them. Aviles said he wouldn't be willing to do that and this exchange apparently marked the end of their business dealings (440-442).

During the fall of 1969, another convicted narcotics violator named Felix Martinez was also dealing in illicit drugs with Aurelio Martinez-Martinez and appellant Mario Lobo. In November, 1969, Felix Martinez received a large shipment of heroin for re-sale. He contacted George Warren Perez, a long-time friend who ran a travel agency at 109th Street and Amsterdam Avenue and inquired as to whether he knew any potential customers. Perez offered to contact a

man named Mario Lobo to see if he was interested and arrange an introduction (723-727, 729, 885-888).

The next afternoon Felix Martinez returned to the travel agency and was introduced to appellant Mario Lobo. Lobo brought Aurelio Martinez-Martinez with him, who Felix Martinez had already known for some time as simply, "Julio." Lobo, Martinez and Martinez-Martinez stepped outside of the office to discuss business, leaving Perez behind. After some negotiations, Lobo finally agreed to purchase two kilos from Felix Martinez at \$15,000 each. He informed Martinez that he was flying to Miami the next day and that consequently Aurelio Martinez-Martinez, who was his "trusted man" would handle the transaction to its completion. At this point, appellant Lobo returned to Perez' office leaving the other two to work out final arrangements. They eventually agreed to meet that night at 9:00 o'clock at the corner of Fort Hamilton Parkway and New Utrecht Avenue in Brooklyn (729-734, 888-890).

That evening at the appointed location, Aurelio Martinez-Martinez got out of his car carrying a paper bag. They walked together to Felix Martinez' apartment and Aurelio Martinez-Martinez handed over the sack full of cash. Felix Martinez left to collect the heroin from its hiding place after instructing Martinez-Martinez to wait there five minutes and then go to a bar at 40th Street and New Utrecht Avenue. Felix Martinez then headed for his stash, hidden near 42nd Street and Eighth Avenue in Brooklyn and picked up four half-kilo packages. As he was walking toward the bar, carrying the heroin in a paper bag, he met Aurelio Martinez-Martinez and handed the bag over right there in the middle of the street (734-736).

Felix Martinez testified that in March, 1970, he made one further heroin sale to Aurelio Martinez-Martinez. A few days earlier, he had received 10 kilos of heroin from his current source of supply, a man named Giovanni Parisio

(also indicted but never arrested), known to Felix Martinez only as "Janis." Consequently, when he received a message that Aurelio Martinez-Martinez was looking for him, Felix Martinez made arrangements for the two to meet on Amsterdam Avenue between 95th and 96th Streets. At that time Aurelio Martinez-Martinez agreed to purchase 2 kilos for \$30,000. The next day he took delivery at the same location and handed over a package containing the cash (736-741).

B. The flight of co-defendant Aurelio Martinez-Martinez

On the morning of November 8, 1974, a Friday, defendant Aurelio Martinez-Martinez failed to appear for trial. A search of his room at the New York Hilton failed to reveal any evidence that he had removed his personal possessions (652). His "roommate", Jose Ferrar, a convicted narcotics offender and "investigator" for Martinez-Martinez' defense counsel, informed the court that Martinez-Martinez had gone out at 7:30 the previous evening saying he was going over to New Jersey for a drink with friends and that he would return by 10:00 p.m. so they could have dinner together. The defendant telephoned Ferrar twice; but he did not return to his room at all that night (661, 664-667).

When Martinez-Martinez failed to appear in court by late afternoon on Friday, November 8th, the court ordered that his \$100,000 bond be forfeited and a bench warrant be issued (687).

On Monday morning, November 11th, it was determined that all efforts by government agents and defense counsel to locate the absent defendant over the weekend, in both the New York-New Jersey area and in Florida, had met with defeat. The court made a finding that the defendant had voluntarily absented himself and ordered that the trial continue in spite of his absence (694-696).

At this point the attorney for appellant Lobo made a motion for severance and a mistrial alleging that the flight of Martinez-Martinez would result in a prejudicial "spill-over" which would prevent Lobo from receiving "the fair, dispassionate evaluation" of his case to which he was entitled (697-698). Defense counsel also contended vehemently that *Bruton v. United States, supra*, should be applied in a flight situation during a joint trial to require such severance (704-707). Both motions were denied (698, 707).

Prior to the re-commencement of the trial and pursuant to side-bar discussion with counsel (702-704), the Court instructed the jury simply, "As you see, Mr. Martinez-Martinez is not present and I chose to proceed without him. The trial will continue" (711).

Near the completion of the Government's direct case the Assistant United States Attorney advised the Court of the proposed scope of the evidence of the flight of Mr. Martinez-Martinez which he intended to present to the jury (978-981). Defense counsel for appellant Lobo renewed his motions for a severance and a mistrial, once again arguing that the rule of *Bruton* had been triggered (982-985). Martinez-Martinez' attorney objected to presentation of any evidence of his client's flight. All motions were denied (985-988).

The following afternoon, Mr. Ferrar testified under questioning by the Assistant United States Attorney regarding the events leading up to the defendant's final departure from his hotel room on the evening of November 7th (1161-1169, 1176-1182). At one point during Ferrar's testimony the trial judge interrupted to give the jury a careful charge regarding the use they *might* make of the evidence of flight being presented (1169-1171), including a limiting instruction for the protection of the appellant (1171). Several federal agents also testified regarding their futile efforts to locate Martinez-Martinez in Miami, where he was known to

have relatives (1200-1204, 1205-1207), and in the New York-New Jersey area (1207-1208, 1218-1220).

As the Government rested its case, appellant Lobo's counsel renewed his previous request for severance and a mistrial one final time, along with the usual motion for a judgment of acquittal. All motions were summarily denied (1227).

In its charge to the jury the Court gave instructions regarding the inference the jury might draw, should it see fit, from the evidence of Martinez-Martinez' flight which it had heard (see Appellant's Appendix A 17-A 19). In addition, limiting instructions were given that this evidence "should not be charged in any way in determining the guilt or innocence of the defendant Mario Lobo" (A 19).

A R G U M E N T

The admission of evidence of flight of appellant's co-defendant on the issue of consciousness of guilt with appropriate limiting instructions did not violate appellant's Sixth Amendment right to confrontation.

Appellant, mistakenly, contends that the admission of evidence of the flight of his co-defendant during a joint trial violates his Sixth Amendment right to confrontation pursuant to the Supreme Court's ruling in *Bruton v. United States*, 391 U.S. 123 (1968).

Appellant Lobo's position is clearly without legal foundation and consequently he cites no case law in direct support of his contention. The Court's ruling in *Bruton* applies to words and statements only, *United States v. Deutsch*, 451 F.2d 98, 116 (2d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972), and those words must be testimonial in nature, *United States v. Garelle*, 438 F.2d 366, 369-70 (2d Cir. 1970) *cert. dism.* 401 U.S. 967 (1971). Thus, it has been repeatedly held by this Court that even the admission into evidence of address books, letters and slips of paper

found in the possession of one co-defendant which indirectly implicate another defendant do not require the trial judge to grant a severance where appropriate limiting instructions are given.

A recent case in point is *United States v. Cusumano*, 429 F.2d 378, 381 (2d Cir.), *cert. denied*, 400 U.S. 830 (1970) where a co-defendant was arrested in possession of a slip of paper with appellant's name and telephone number written on it and gave a false explanation. This Court found that limiting instructions were appropriate to avoid *Bruton*-type prejudice. See also *United States v. Garelle*, *supra* at 369-70; *United States v. Bennett*, 409 F.2d 888, 897-98 (2d Cir.), *cert. denied*, 396 U.S. 852 (1969).

It must be noted also that to trigger the operation of the *Bruton* rule the statements of a co-defendant must be clearly inculpatory of the defendant. *United States v. Catalano*, 491 F.2d 268, 273 (2d Cir.), *cert. denied*, 95 S. Ct. 42 (1974); *United States ex rel. Nelson v. Follette*, 430 F.2d 1055, 1056-1059 (2d Cir. 1970), *cert. denied*, 401 U.S. 917 (1971); *United States v. Sparano*, 422 F.2d 1095, 1099 (2d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971). Thus, even if it somehow could be argued that in the case at bar the co-defendant's flight was a "statement" within the meaning of *Bruton*, such a "statement" could certainly not be construed as clearly implicating the appellant in the crime. In fact, the trial court's charge with regard to the fleeing co-defendant, Martinez-Martinez, stated that the jury "may" (but is not required to) consider the fact of his flight as evidence of consciousness of guilt and that it should also "consider that there may be reasons for this which are fully consistent with his innocence." (Appellant's Appendix, A. 17-A. 19). Thus, if evidence of flight is not clearly inculpatory of the defendant who has actually taken flight, it obviously cannot be so clearly inculpatory of appellant as to require the application of *Bruton*.

In addition, appellant Lobo had the protection of limiting instructions to negative any potential prejudice which

might exist (see trial transcript at p. 1171 and Appellant's Appendix at A. 19).^{*} Clearly, such cautionary instructions are adequate to protect a defendant's constitutional rights in situations where there is not a "substantial risk that the jury despite instructions to the contrary" will look to the incriminating extrajudicial statements in determining defendant's guilt or innocence (*Bruton*, *supra* at p. 126) and where "no such 'devastating' risk attends the lack of confrontation as was thought to be involved in *Bruton*."^{**} *United States ex rel. Catanzaro v. Mancusi*, 404 F.2d 296, 300 (2d Cir. 1968), *cert. denied*, 397 U.S. 942 (1970). Particularly where, as in the case at bar, the issues are "relatively simple and easily separable," limiting instructions "may be assumed to have been effective" *United States v. Catino*, 403 F.2d 491, 496 (2d Cir. 1968), *cert. denied*, 394 U.S. 1003 (1969).

^{*} It would seem also that this evidence of flight was admissible against both defendants as there is precedent to the effect that "conduct of a conspirator, not consisting of a hearsay declaration, is admissible to prove the existence of the conspiracy even though occurring after the termination of it." *United States v. Tramunti*, — F.2d — (2d Cir., Slip. Opin. 2107, 2157-2158; March 7, 1975); see also, *United States v. Tirinkian*, 488 F.2d 873, 874 (2d Cir. 1973). The fact that such evidence will tend to show the defendants' association with each other would not seem, in view of the Court's holding in *United States v. Ellis*, 461 F.2d 962, 970 (2d Cir.), *cert. denied*, 409 U.S. 866 (1972), to render it inadmissible. See also, *United States v. Deutsch*, *supra*, 451 F.2d at 15; *United States v. Garelle*, *supra*, 438 F.2d at 370.

^{**} Such allied situations have included *inter alia*: when the defendant has made an interlocking confession, *United States ex rel. Duff v. Zelker*, 452 F.2d 1009, 1010 (2d Cir., 1971), *cert. denied*, 406 U.S. 932 (1972); *United States ex rel. Catanzaro v. Mancusi*, *supra*; when redaction is adequate to prevent prejudice, *United States ex rel. La Belle v. Mancusi*, 404 F.2d 690, 691-692 (2d Cir. 1968); and statements made in the course of a conspiracy, *United States v. Projansky*, 465 F.2d 123, 137-138 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972); *United States v. Weiser*, 428 F.2d 932, 937 (2d Cir. 1969), *cert. denied*, 402 U.S. 949 (1971).

Evidence of flight during trial by a co-defendant presented to the jury on the issue of consciousness of guilt is among those situations where limiting instructions have been deemed adequate to protect a defendant's constitutional rights. Cases on all fours with the facts at issue here include *United States v. Henderson*, 472 F.2d 157, 158 (6th Cir. 1973), (the latest case in the circuits, where *Bruton* is not even mentioned); *United States v. Cianchetti*, 315 F.2d 584, 588-589 (2d Cir. 1963); *United States v. Allocco*, 234 F.2d 955, 956 (2d Cir. 1956). And most recently in *United States v. Tortora*, 464 F.2d 1202, 1207 (2d Cir. 1972) this Court once again reiterated by implication its previous rulings.*

Cases also abound in this circuit upholding presentation of other types of evidence against one defendant of his consciousness of guilt with limiting instructions for the protection of co-defendants. Frequently, such evidence shows an attempt by one defendant to cover-up his participation in the illegal activities at issue. Worthy of mention in this regard are *United States v. Deutsch*, *supra*, 451 F.2d at 116, where a co-defendant's stock purchase reports to the SEC were put into evidence to show he had deliberately tried to hide certain illegal investments and *United States v. Dardi*, 330 F.2d 316, 333-334 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964), where evidence that one defendant had tried to bribe an officer of the Department of Interior to quash an SEC investigation was adduced at the trial. In addition, evidence that one defendant made false statements to members of law enforcement in an attempt to exculpate himself is often presented. For example, in *United States ex rel. Nelson v. Follette*, *supra*, 430 F.2d at

* In *United States v. Tortora*, *supra*, the Court for the first time upheld the trial of a co-defendant in absentia even though he was not even present during jury selection as he had previously entered a plea to the charge and was clearly aware of the trial date.

1056-1059, a co-defendant made statements in an attempt to extricate himself while pinning the crime on someone very similar in appearance to the appellant but known by a different name; and in *United States v. Corallo*, 413 F.2d 1306, 1327-1328 (2d Cir.), *cert. denied*, 396 U.S. 958 (1969) and *United States v. Carella*, 411 F.2d 729, 732 (2d Cir.), *cert. denied*, 396 U.S. 860 (1969) one co-defendant tried to extricate himself by "brazenly" lying to the grand jury.

Many of the cases in the area of consciousness of guilt present situations which are much more clearly inculpatory of the other defendants than is evidence of flight and yet limiting instructions are held to be adequate protection from potential prejudice. Thus, in *United States v. Cusumano*, *supra*, the co-defendant was arrested in possession of a slip of paper containing the appellant's name and telephone number. When asked by FBI agents how he knew the appellant he stated falsely that he was a player on a boy's basketball team which he coached. The statements were held properly admitted into evidence with limiting instructions. Surely that type of evidence of consciousness of guilt was more clearly inculpatory of the defendant whose name and phone number was recovered than is evidence of flight in the case at bar. Of very similar import, also, are *United States v. Tropiano*, 418 F.2d 1069, 1080 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970), where a co-defendant tried to exculpate himself by claiming he didn't know the co-defendant and *United States v. Kellerman*, 431 F.2d 319, 324 (2d Cir.), *cert. denied*, 400 U.S. 957 (1970), where one co-defendant told lies to avoid further suspicion. Consequently, it is clear that the situation under consideration here is not so fraught with danger as to render limiting instructions inadequate and severance required.

Finally, appellant's subsidiary contention that a severance should have been granted is without merit. Severance is discretionary with the court and is only required

where substantial prejudice would ensue from a joint trial. It is not required simply because it would give a defendant a better chance of obtaining an acquittal. *United States v. Vega*, 458 F.2d 1234, 1236 (2d Cir. 1972); see also, *United States v. Turcotte*, — F.2d — (2d Cir. Slip opin. 2957, 2965, April 17, 1975); *United States v. Papadakis*, 510 F.2d 287 (2d Cir. 1975). Rule 14 of the Federal Rules of Criminal Procedure states that the court "may" grant severance "or provide whatever other relief justice requires." Thus, it allows for situations where the court feels limiting instructions would provide adequate protection.

Denial of severance has been upheld in situations where evidence of criminal activity found in the possession of one co-defendant is introduced against him only with limiting instructions, see *United States v. Del Purgatorio*, 411 F.2d 84, 87 (2d Cir. 1969); *United States v. Mazzochi*, 424 F.2d 49, 52 (2d Cir. 1970), and where evidence of prior similar acts by one defendant are put into evidence, see *United States v. Baum*, 482 F.2d 1325, 1332 (2d Cir. 1973); compare, *United States v. Bless*, 422 F.2d 210, 213 (2d Cir. 1970). Denial of severance has been consistently upheld where one or more co-defendants have pleaded guilty and simply disappear from the trial and even where the jury has been told directly that they pleaded guilty and then has been given limiting instructions for the protection of remaining defendants.* See *United States v. Price*, 447 F.2d 23, 30 (2d Cir.), cert. denied, 404 U.S. 912 (1971); *United States v. Freeman*, 302 F.2d 347, 350 (2d Cir. 1962); *United States v. Del Purgatorio*, *supra*; *United States v. Dardi*, *supra*, 330 F.2d at 332-333; *United States v. Aronsor*, 319 F.2d 48, 52 (2d Cir. 1963). It would seem clear that knowledge of a jury that co-defendants have pleaded guilty would provide much more potential for prejudice than would the mere silent flight of a co-defendant.

* See *LaBuy, Jury Instructions in Federal Criminal Cases* (West Publishing, 1965), Section 3.02-1 at page 13.

Finally, even could *Bruton* error somehow be found here, reversal is not mandated as the evidence of appellant's guilt is so overwhelming that "there exists no reasonable doubt that absent commission of the error . . . that the jury would have convicted in any case. . . ." See *Chapman v. California*, 386 U.S. 18 (1967); *Harrington v. United States*, 395 U.S. 250 (1969); *Schneble v. Florida*, 405 U.S. 427 (1972); *United States ex rel. Ross v. LaVallee*, 448 F.2d 552 (2d Cir. 1971); *United States ex rel. Smith v. Montanye*, 505 F.2d 1355 (2d Cir. 1974).

CONCLUSION

The judgment of conviction should be affirmed.

Dated: May 7, 1975

Respectfully submitted,

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* The United States Attorney's Office wishes to acknowledge the invaluable assistance of Ruth E. Sobell in the preparation of this brief. Ms. Sobell is a third year law student at Brooklyn Law School.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

EVELYN COHEN

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 9th day of May 1975 he served ^{2 copies} ~~copy~~ of the within

BRIEF

by placing the same in a properly postpaid franked envelope addressed to:

Albert J. Krieger, Esq.

401 Broadway

New York, N. Y.

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

Evelyn Cohen

Sworn to before me this

9th day of May 1975

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-501756
Qualified in Kings County
Commission Expires March 30, 1977